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No. 526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HOLLAND-AMERICA LINE,

Petitioner,

v.

TEXPORTS STEVEDORING COMPANY, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 526

In The

Supreme Court of the United States

October Term, 1963

Holland-America Line,

Petitioner,

v.

Texports Stevedoring Company, Inc.,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Texports Stevedoring Company, Inc., respectfully submits that the shipowner's Petition For a Writ of Certiorari should be denied because:

1. The decision of the court below is in harmony with the previous decisions of this and other Federal courts, and

2. In view of the written contractual provision (not usually found in stevedoring contracts) requiring the shipowner to directly supervise the stevedoring operations at all times, the decision below turns upon its own contractual terms and facts, and does not present a case in which an important question of general import in the field of maritime law is presented.

QUESTION PRESENTED

The shipowner's statement of the question presented on this petition is both inaccurate and misleading.[1] When all of the facts of the case as found by the jury are considered, the question presented is accurately stated as follows:

> When the stevedoring company did nothing more than use the ship's own winch for the very purpose for which the ship supplied it, was the Court below correct when it held that the shipowner's conduct was sufficient to preclude its recovering indemnity from the stevedoring company because the shipowner flagrantly breached its contractual obligations to the stevedoring company in the following particulars:
>
> 1. The shipowner *negligently* furnished the stevedore a winch which the shipowner knew was unseaworthy.[2]

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[1] It is inaccurate and misleading because:

1. It implies that the stevedoring company was using the winch in a negligent manner when, in fact, the jury found that the stevedoring company used the ship's winch in a proper and non-negligent manner, and

2. It attempts to create the impression that the defective condition of the vessel's winch was not discovered or known by the shipowner prior to the accident, when, in fact, as the jury found, the defective condition of the winch was known to the shipowner before it ever supplied it to the stevedoring company for use on the date in question, approximately five hours prior to the accident. The defective condition of the winch as the jury found was known to the vessel owner before the stevedoring company even came aboard the vessel to commence work.

[2] As the jury found the shipowner negligently failed to keep the winch in a proper state of repair and supplied the defective winch to the longshoremen when they first went aboard the vessel to work on the morning of this accident some five hours prior to the accident. This was a direct breach of the shipowner's undisputed contractual obligation to furnish winches at all times which would permit efficient stevedoring operation.

2. The shipowner *negligently* failed in the duty, which it alone had, to repair its own winch when it knew it was defective,[3]

3. The shipowner *negligently* permitted the loading operations to continue after it had knowledge that its winch was defective in direct breach of its written obligations under the stevedoring contract to directly and properly supervise the work at all times.

ADDITIONAL FACTS ESSENTIAL TO THIS COURT'S CONSIDERATION OF PETITIONER'S PETITION

Before proceeding further, this Court needs the benefit of some additional facts which either are not stated fully or not stated at all in the Petition of the shipowner.

Unlike the situation existing in most indemnity cases of this type, a written contract existed between the shipowner and the stevedoring company in this case with respect to the stevedoring work to be done by the stevedoring company aboard all vessels of the shipowner calling in certain Texas ports. To insure that there was no misunderstanding as to the responsibilities of the parties with respect to the supervision of the stevedoring work aboard these vessels,

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[3] The jury found that the shipowner had knowledge of the defective condition of its own winch for a sufficient period of time prior to the accident that repairs could have been made, but that the shipowner negligently failed to make these repairs which was a direct breach of its contractual obligation to the stevedore. It is without dispute that the shipowner alone had this duty and that the stevedoring company was under no duty whatsoever, express or implied, to make any repairs to the vessel's defective winch. The vessel's Chief Mate Bosman unequivocally confirmed this when he was asked, "You wouldn't ever look to the longshoremen to make any repairs to the winches?" and he replied categorically, "No sir." (S.F. 1189).

this duty and responsibility was laid squarely and completely on the vessel owner by this language in the contract:

> "*The work at all times to be under direct supervision of the agents of the Holland-America Line*, in consultation with their representatives, who will decide as to the number of gangs and hatches to be worked, stowage of cargo, etc". (Emphasis supplied).[4]

In view of the shipowner's express retention of this obligation to directly supervise the work at all times, the Court below correctly held that the utter and complete failure of the shipowner to perform this contractual obligation to the steyedoring company by stopping the work and repairing the vessel's own defective winch was conduct on the shipowner's part sufficient to preclude the recovery of indemnity.

The longshore gang of which the decedent, Vassallo, was a member boarded the SS EEMDYK on May 26, 1957, at approximately 0700 hours to load bags of flour into the No. 5 hold by means of two winches at the forward end of the hold on the main deck level. Vassallo met his untimely death shortly before noon on that date. Throughout all of the cargo operations on the morning of May 26, 1957, aboard the SS EEMDYK, that vessel's senior Fourth Officer was present and on duty at the No. 5 hold, and the Second Officer was present and also on duty at the No. 5 hold while the loading operations were being performed that morning except for a 30 to 45 minute period of time.[5]

Thus, at least one of the vessel's officers (and for substantially all of the five hour period to this man's death there were two such officers) was present at all times material

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[4] S.F. 1467

[5] S.F. 1184, 1185, 1187 and 1190.

hereto to carry out the vessel's contractual obligation of directly supervising the work of the longshoremen. The shipowner's Petition attempts to create the impression that it was the sole responsibility of the stevedoring company to make any decisions as to whether or not the work was to be stopped if a piece of the vessel's own equipment was defective. The written contract and all of the testimony in the record on this point which came from the vessel's own Second Mate, the Stevedoring Superintendent and the stevedoring company's Walking Foreman simply do not support this contention.[6] Additionally, since the vessel did not call to testify the Senior Fourth Officer who was the only ship's officer who was present and on duty at the hold through the entire morning, under the well established admiralty rule, the failure of the shipowner to present this important witness raises the presumption that his testimony would have been adverse to the vessel's present contention that the stevedoring company was left with the decision as to whether the work was to be stopped or not.

Thus, unlike the situation existing in the cases relied on by the shipowner in its Petition where the cargo operations were turned over, in their entirety to an expert stevedore to perform the loading operations with the stevedore fully

[6] The Second Mate, one of the vessel's two officers who was present to supervise the work that morning, verified the fact that the officer in charge of the cargo operations had the duty to halt the work until any dangerous condition had been corrected. (S.F. 1185). The stevedoring company's Superintendent testified that the decision to stop or to terminate the work rested with the vessel's Mate in charge of the cargo operations at the hold. (S.F. 1463). Likewise, the stevedore's Walking Foreman testified that the vessel's officer in charge of the loading operations was the one to make the decision insofar as halting the cargo operations was concerned. (S.F. 1388).

exercising its expertise, the shipowner in its written contract expressly retained the complete right of control and supervision, and actually had two of the vessel's officers present to perform this very function. Whatever the duties of the stevedoring company may have been as an expert stevedore had the shipowner turned these cargo operations over to it entirely, that is not the situation existing in this case as the Court below clearly recognized, for it is clear not only from the contract in writing, but from the actual manner in which the contract was performed, that the vessel owner completely retained the right to decide which hatches were to be worked, what winches at each hatch were to be used, when they were to be worked, and when it was necessary to cease these operations because of any defective equipment supplied by the vessel.[7]

The detailed jury findings in answer to 74 separate special issues can for convenience be condensed to very basic terms as the vessel's defective winch is the only condition aboard the vessel which the jury found in any way contributed to Vassallo's death. As so condensed, these findings set out in separate columns for comparative purposes are:

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[7] In its petition (page 5), the vessel owner apparently suggests that the section of which set of winches was to be used at this particular hatch was the responsibility of the stevedoring company. Obviously, this decision, which would require the stevedoring company to take the necessary time to rig another set of winches for which it would have received additional compensation from the shipowner, is obviously a matter of supervision and as such the selection of which set of winches was to be used was the responsibility of the vessel and not the stevedore.

As To Shipowner:	As To Stevedoring Company
1. That the winch furnished by the shipowner was defective and the shipowner negligently failed to keep its winch in a proper state of repair, which condition of the winch and such negligence was a proximate cause of the accident.[8]	
2. That the shipowner's winch was defective when turned over to the longshore gang to be used in the loading operations.[9]	
3. That the shipowner had knowledge that the winch was defective prior to the accident, that with such knowledge for a sufficient period of time prior to the accident for repairs to be made, the shipowner negligently failed to make such repairs and such negligence was a proximate cause of the accident.[10]	
4. That the shipowner negligently permitted the loading operations to continue after it had knowledge of the defective con-	1. That the stevedoring company continued to use the winch with knowledge that it was defective or not in a proper state of

[8] Special Issues No. 1, 2, 3 and 4. Transcript 268.

[9] Special Issue No. 49. Transcript 278.

[10] Special Issues Nos. 50, 51, 52 and 53. Transcript 279.

As To Shipowner:	As To Stevedoring Company
dition of its winch and that such negligence was a proximate cause of the accident.[11]	repair, that such continued use was negligence which was a proximate cause of the accident.[12]
	2. The winch operator, Townsend, operated the winch in a non-negligent manner.[13]

DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS

The decision of the Court below is not in any conflict with this Court's decisions in *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956) and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958) as the shipowner contends. These two decisions of this Court established the now well settled rules that if a stevedore breaches its warranty of workmanlike service,

[11] Special Issues Nos. 54, 55 and 56. Transcript 280.

[12] Special Issues Nos. 30, 31, 32 and 33. Transcript 274.

[13] The shipowner's petition recites findings made by the jury with respect to the winch operator's conduct (page 5). The jury specifically found that the stevedoring company's winch operator was not negligent in any respect and therefore did not make any finding that any of his conduct was a proximate cause of the accident. One of the findings made by the jury was to the effect that the winch operator was not negligent in letting the winch control lever go into the hoist position, and that this conduct was neither the sole proximate cause of the accident or even a proximate cause of it. The evidence had shown that at the time of the accident, the signal had been given to lower rather than to hoist on the winch, and thus the jury obviously concluded that Townsend was not negligent because the winch control lever went in the wrong direction. This the jury concluded because of the testimony of Townsend that the operating lever or handle on the winch was so loose that it interfered with the proper operation of the winch. Thus, the jury has expressly found that the stevedoring company's winch operator was not negligent to any extent and used reasonable care in the operation of the winch furnished by the shipowner. (S.F. 311, 356, 357, 359).

it must indemnify the vessel owner for damages the vessel owner has to pay to injured longshoremen unless there is conduct on the part of the shipowner sufficient to preclude indemnity.

Three important factors existed in both the *Ryan* and *Weyerhaeuser* cases which caused the imposition of indemnity on the stevedore which are vastly different from those existing in the present case:

1. In *Ryan* the stevedore negligently created the unseaworthy condition which caused the accident by improperly stowing the cargo, and likewise in *Weyerhaeuser* the stevedore negligently created the unseaworthy condition which caused the accident by erecting a defective shelter on the vessel's deck. In the present case, however, the unseaworthy condition of the winch which killed this longshoreman was negligently created by the shipowner itself, and in fact was known by the vessel owner to be defective before it was ever supplied to the stevedore to be used in the cargo operations. The stevedore here had absolutely nothing to do with the creation of the unseaworthy condition of the winch.[11]

[11] The Shipowner's Petition (page 9) attempts to negative the shipowner's conduct in furnishing a defective winch at the time the cargo operations started on the date of this accident by referring to this Court's decision in *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423 (1959). The *Crumady* case does not assist the shipowner here as indemnity was imposed on the stevedore in *Crumady* because the stevedore negligently rigged the vessel's boom so that a greater strain was placed on the winch than was contemplated by the vessel in connection with the cargo operations. It was this negligent use by overloading the winch by the stevedore which required it to indemnify the shipowner and indemnity was not imposed because the stevedore simply continued to use the winch for the purpose for which it was supplied by the vessel owner. In the present case, as the jury found, the unseaworthy winch supplied by the vessel owner was used in a non-negligent manner by the stevedore. Thus, it was the actual negligent overloading or use of the defective appliance that imposed indemnity on the stevedore in *Crumady*, whereas the jury found in this case that the winch was not operated negligently by the stevedore.

2. In *Ryan*, the stevedore clearly had the sole responsibility to correct its own improper stowage of cargo, and likewise in *Weyerhaeuser* the stevedore had the sole responsibility to correct the unseaworthy condition of the shelter which it had erected on the vessel's deck. In this case, however, the sole and exclusive responsibility for correcting the defective condition of the vessel's own winch was that of the shipowner, for it is undisputed that the shipowner alone had the duty to repair the defective winch and the stevedoring company would not have been permitted to make repairs had it attempted to do so.

3. In both *Ryan* and *Weyerhaeuser* the shipowners turned over to the stevedoring companies complete control of the stevedoring operations with the expectation that the stevedores would use their expert knowledge as stevedores in carrying out these operations, subject only to the shipowners' general over-all interest in all operations aboard their vessels. In the present case, however, the shipowner did not rely upon the expertise of the stevedore, was unwilling to relinquish control over the supervision of the work and expressly reserved in its contract to itself the responsibility of directly supervising the stevedoring operations at all times.

In *Ryan* and *Weyerhaeuser* the stevedore not only created the unseaworthy condition but had the duty to correct it, whereas in the present case exactly the opposite is true — the unseaworthy and defective winch was created and supplied by the shipowner and the shipowner alone had the duty to correct its own defective equipment.

What the shipowner asks this Court to do, as it did in the Court below, is to adopt a rule of law that would require a stevedoring company to stage a sitdown strike or refuse to work with the vessel's gear in an attempt to force the vessel's officers and crew members to perform their clear

and undisputed contractual obligations to the stevedore. The shipowner would have the Court imply such onerous duties and responsibilities on a stevedoring company that the vessel and its crew could utterly and completely disregard their obligations to supervise the work and to repair their own defective appliances. Such a rule of law would put this shipowner in a position of knowing that if it did not comply with its affirmative duties of supervision and repair in this stevedoring contract, or even furnished unseaworthy gear and equipment as it did in this case before the operations ever started, the shipowner would still be able to recover any damages that might be imposed upon it for an injury to a longshoreman. Any such rule which would permit the shipowner to ignore its plain and affirmative contractual duties to repair its own equipment would, in the language of the United States Court of Appeals for the Ninth Circuit,

> "... place a premium upon unseaworthiness of the ship and negligence by her crew and officers. This spurious argument would reverse the maritime policy of ages, which has even firmer foundation under modern conditions."[1]

DECISION BELOW FULLY SUPPORTED BY FEDERAL COURT DECISIONS

The theory on which the shipowner asks for indemnity in this case is that the stevedore should have refused to work — either walk off the job or stage a sitdown strike — until the shipowner had complied with its own contractual obligations to the stevedore to furnish seaworthy winches and to repair them at any time such repairs were needed during the cargo operations. Precisely this same contention has been urged in at least ten different Federal Court

[1] *United States v. Harrison*, 245 F 2d 911 at p. 915 C.A. 9, 1957

cases and in each and every one of them the Federal Courts have declined to permit the shipowner to recover indemnity where both the stevedore and the shipowner had knowledge of a defective condition aboard the vessel, the shipowner had failed in its duty to correct this condition and the shipowner had permitted the operations to continue with knowledge of the defect. Four of these cases are substantially identical with the present case as they involve defective winches furnished by the vessel owner, which the vessel owner had the duty to repair, but did not do so and instead permitted the loading operations to continue. In each of these four cases the stevedore did nothing more than to continue to use the winch for the purpose for which it had been furnished by the vessel which is precisely all that the stevedoring company did in the case presently before the Court. See:

1. *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32 (3 C.A., 1961).

A defective winch case in which the condition had been created by the shipowner, attempts had been made to repair the winches by the vessel owner, and the vessel owner permitted the operations to continue with knowledge of the defect. Indemnity was denied. In the *Hodgson* case the vessel owner came much closer to fulfilling its contractual obligations to the stevedore than Holland-America Line did in this case. In *Hodgson* the shipowner tried to repair the winch but without success, while Holland-America Line in this case stood idly by and negligently failed to even attempt repairs. If a shipowner is not entitled to indemnity when it makes an effort to correct the condition as was true in *Hodgson*, for even stronger reasons a shipowner who does nothing and in fact negligently fails to stop the work and negligently fails to even attempt to make repairs as did the shipowner in this case is not entitled to indemnity.

2. *Hagans* v. *Farrell Lines*, 237 F. 2d 477 (C.A. 3, 1956).[16]

3. *Smith* v. *Pan-Atlantic Steamship Corporation*, 161 F. Supp. 422 (E.D. Pa., 1957), affd. per curiam 254 F. 2d 600 (C.A. 3, 1958).[17]

4. *Cruz* v. *Hudson Steamship Co., Ltd.* v *Colon*, 206 F. Supp. 216 (D.C., Puerto Rico, 1962).[18]

The other six cases wherein the contention was made that the stevedore had a duty to stage a sitdown strike which contention was rejected and the shipowner was thereby denied indemnity involved other defective or unseaworthy conditions aboard a vessel. While winches were not involved in these six cases, in each of them as is also true in the present case the defective or unseaworthy condition which caused the longshoreman's injury had been created by the shipowner, the shipowner had the duty to correct it and the shipowner had permitted the loading operations to continue with knowledge of the defect. In each instance the shipowner was denied indemnity. See

1. *United States* v. *Harrison*, 245 F. 2d 911 (C.A. 9, 1957).

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[16] Another defective winch case in which the vessel owner had created the condition, had the duty to keep the winches in proper working order, and permitted the operation to continue with knowledge of the defect. Indemnity was denied.

[17] Another defective winch case in which the vessel owner had created the condition, had the duty to correct it, and permitted its continued use with the knowledge of its defective condition. Indemnity was denied.

[18] Another defective winch case. The vessel owner had created the condition, had attempted to make repairs without success, had the duty to repair the winches and permitted the operations to continue with knowledge of the defect. Indemnity was denied.

This case involved an injury to a longshoreman because of grease on the deck of the vessel from the crank cases of a cargo of jeeps which were being discharged. The shipowner had created the condition, had the duty to correct it, and permitted the operations to continue with knowledge of the defect. Indemnity was denied. In rejecting the shipowner's claim that the stevedore was under an obligation to refuse to work when a defective or unsafe condition existed aboard the vessel, the Court of Appeals for the Ninth Circuit said:

> "The fact that the stevedore tried everything but a work stoppage or a sitdown strike before working under these conditions is certainly sufficient to support this finding (no indemnity)." (Parenthetical expression added). 245 F. 2d 911, at page 916.

2. *American Steamship Company* v. *Copp*, 245 F. 2d 291 (C.A. 9, 1957).[19]

3. *Piscopo* v. *The United States*, 167 F. Supp. 777 (E.D., N.Y., 1959).[20]

4. *Autobuses Modernos, S. A.* v. *The Federal Mariner*, 125 F. Supp. 780 (E.D. Pa., 1954).[21]

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[19] This case involved an injury to a longshoreman because of the presence of fish oil which had been placed on the deck by the vessel while at sea and which made the vessel's deck slippery. The vessel had created the condition, had the duty to correct it and permitted the operations to continue with knowledge of the defect. Indemnity was denied.

[20] This case involved an injury to a longshoreman because of a defective hi-lo machine furnished by the pier owner. The pier owner created the defective condition, had the duty to correct it and permitted the cargo operations to continue with knowledge of the defect. Indemnity was denied.

[21] This case involved an injury to a longshoreman which resulted from the improper manner in which the vessel had been rigged for the cargo operations by the vessel's personnel. The unseaworthy condition was created by the vessel, the vessel had the duty to correct it and the vessel permitted the operations to continue with knowledge of the defective condition. Indemnity was denied.

5. *Marshall* v. *SS Lake Atlin*, 1960 A.M.C. 2024 (D.C. Ore., 1960).[22]

6. *Kissinger* v. *United States*, 176 F. Supp. 828 (E.D., N.Y., 1959).[23]

In each of the ten foregoing cases, the stevedoring company continued to use the defective equipment or to work with knowledge of the defective condition but did so in a non-negligent manner, simply using the equipment or the condition supplied by the vessel for the purposes for which they were intended to be used. The stevedoring company did nothing more than this in the present case. Likewise, as was true in each of the ten foregoing cases in all of which the shipowner was denied indemnity, the shipowner in this case breached its obligations to the stevedoring company in the following particulars:

1. It negligently furnished a winch which was defective.

2. It negligently failed to correct the defect by repairing the winch.

3. It negligently permitted the loading operations to continue when it had knowledge that the winch was

[22] This is a case in which hatch boards and dunnage were placed on the deck by the vessel. The longshoreman was injured as a result of this unseaworthy condition. The unseaworthy condition was created by the vessel, the vessel had the duty to correct the condition and the vessel permitted the operations to continue with knowledge of the defective condition. Indemnity was denied.

[23] A longshoreman was injured when a hatch board furnished by the vessel owner on which he had to work gave way, both the stevedore and vessel owner had knowledge of the defective hatch board. Indemnity was denied as all work was being done under the direction and supervision of the Master of the vessel, and there was no evidence that the stevedore had done anything other than to use the hatch boards for the purpose for which they were supplied. Indemnity was denied.

defective in an affirmative direct breach of its duty under the stevedoring contract to directly and properly supervise the work at all times.

If this conduct on the shipowner's part is not sufficient to preclude indemnity, what other wrongful acts could the shipowner have done in this case which would have prevented its right to recover indemnity? As the foregoing ten cases clearly demonstrate, the Court below correctly held that the shipowner's conduct in this case precluded it from recovering indemnity from the stevedoring company.

PETITIONER'S CASES DO NOT SUPPORT ITS CONTENTIONS THAT THE COURT BELOW ERRED

Absolutely none of the cases cited or relied on by the shipowner in its Petition are in any way comparable to the foregoing ten cases or to the case presently before the court, and none of Petitioner's cases support its contention that the decision of the Court below that indemnity should be denied should be reversed. Petitioner cites eleven cases on which it relies to support its claim that the Court below erred in denying the shipowner indemnity in this case. Ten of these eleven cases actually involve only three types of cases in which the courts have held stevedores liable to indemnify vessel owners.[24] A brief reference to each of

[24] The eleventh case cited in the shipowner's Petition, *U. S. v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C.A. 9, 1950) is the only one that does not fall into one of these three types of cases. However, it is an old case, and as the opinion in that case shows, its decision was based purely on a tort theory of recovery, for it turned on the question of "active" and "passive" negligence, and it is certainly of no significance here, for this Court clearly stated in the *Weyerhaeuser* case "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate," 355 U.S. 563, at page 569.

The real inapplicability and lack of authority of the *Roths-*

the cases of these three types relied on by Petitioner and the basis on which indemnity was allowed the shipowner in those cases will graphically point up the difference in Petitioner's cases from the case presently before this Court.

For easier consideration by the Court Petitioner's cases will be grouped and discussed in these three categories rather than in the order in which they are cited in Petitioner's Application.

I.

Cases in which indemnity was allowed the shipowner because the defective equipment furnished by the vessel was used in a negligent manner by the stevedore, that is, there was substantial negligence of the stevedore other than simply continuing to use the equipment for the purpose for which the vessel furnished it. All the stevedoring company did in the case presently before this Court was to use the winch for the purpose for which the vessel supplied it.

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child case from the Court of Appeals for the Ninth Circuit, however, is graphically illustrated by two later decisions of the same Court of Appeals for the Ninth Circuit. For a discussion of these two cases, see *United States v. Harrison*, 245 F. 2d 911 (C.A. 9, 1957) and *American Steamship Company v. Copp*, 245 F. 2d 291 (C.A. 9, 1957), supra pages 13 and 14 . . . Suffice it to say that in both the *Harrison* and *Copp* cases, the unseaworthy condition of the vessel which carried the longshoreman's injury was known to both vessel owner and the stevedore, and in both cases the Court of Appeals for the Ninth Circuit held that the vessel owner was not entitled to indemnity simply because the stevedoring company continued to work with knowledge of the unseaworthy condition. These two cases clearly demonstrate that, in fact, in these implied contractual indemnity cases stemming from this Court's decision in the *Ryan* case in 1956 the Ninth Circuit does not follow its 1959 decision in the *Rothschild* case.

1. *Crumady* v. *Joachim Hendrik Fisser*, 358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445 (1959). (Shipowner's Petition, pages 9 and 13).[25]

2. *Calmar Steamship Corporation* v. *Nacirema Operating Co.*, 266 F. 2d 79 (C.A. 4, 1959), certiorari denied, 361 U.S. 816, 4 L. Ed. 2d 62, 80 S. Ct. 56. (Shipowner's Petition, page 13).[26]

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[25] This case involved a winch which the Court held to be defective or unseaworthy because of the manner in which the vessel had set a cut-off device. The stevedore negligently rigged the vessel's boom so that a greater strain was placed on the winch than was contemplated by the vessel in connection with the cargo operations. It was this negligent overloading of the winch by the stevedore which required it to indemnify the vessel owner. Unlike the situation here, where the stevedore's winch operator Townsend used the defective winch in a non-negligent manner, in *Crumady* the accident never could have happened if the stevedore had not negligently overloaded the winch. This is a far cry from a holding that continuing to use a defective winch in a reasonably safe manner, as did the stevedore here, requires a stevedoring company to indemnify the shipowner. In *Crumady* it was a negligent rigging of the vessel's boom which placed an improper strain on the winch that imposed indemnity on the stevedore, whereas in this case the jury expressly found that the winch was not operated or used by the stevedoring company in a negligent manner. Thus, it is perfectly clear from *Crumady* that some conduct on the part of the stevedore other than the non-negligent operation of a defective appliance must be present before indemnity is allowed. There is no such other negligent conduct of the stevedoring company in this case.

[26] This case involved a cluster light furnished to the stevedoring company by the vessel which was defective because it was not seized or securely fastened to its cable. The stevedoring company had to indemnify the vessel owner because one of its longshoremen negligently threw the unseized light into the hold of the vessel so roughly that it was jerked loose from its cable. The stevedore was held liable because it negligently used a defective appliance, in contrast to the stevedoring company's conduct here where it used the defective appliance in a non-negligent manner.

II.

Cases in which the stevedore was held liable for indemnity because the stevedore had created the unseaworthy or defective condition aboard the vessel and the stevedoring company had failed in its duty to correct the condition. In the case presently before this Court, the stevedoring company did not create the condition and it had no duty to repair the winch as this was exclusively the vessel's responsibility.

1. *Ryan Stevedoring Company* v. *Pan-Atlantic Steamship Co.*, 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1959). (Shipowner's Petition, pages 6, 7, 12).[27]

2. *Weyerhaeuser Steamship Company* v. *Nacirema Operating Company*, 355 U.S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958). (Shipowner's Petition, pages 7, 12).[28]

III.

Cases in which the stevedore was held liable for indemnity because the stevedore had knowledge of a defective or unseaworthy condition aboard a vessel and the stevedore failed either in its duty to correct he unseaworthy condition or to report the unseaworthy condition to the vessel's personnel in order that it could be corrected by the vessel's crew or the vessel had no knowledge of the defective condition. In the case presently before this Court, the stevedoring company had no duty to correct the defective winch, had reported it to the vessel and the vessel had full knowledge of the defect and the duty to correct it.

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[27] See full discussion of this case *supra*, pages 8 to 11.

[28] See full discussion of this case, *supra*, pages 8 to 11.

1. *American President Lines* v. *Marine Terminal Corporation*, 234 F. 2d 753 (C.A. 9, 1956); certiorari denied, 352 U.S. 925, 1 L. Ed. 2d 161, 77 S. Ct. 222 (Shipowner's Petition, page 13).[29]

2. *Parenzan* v. *Ino Kaiun Kabushiki Kaisha*, 251 F. 2d 928 (C.A. 2, 1958), certiorari denied, 356 U.S. 939, 2 L. Ed. 814, 78 S. Ct. 781 (Shipowner's Petition, page 12).[30]

3. *Smith* v. *Juaosalvenska Linijska Plovidba*, 278 F. 2d 176 (C.A. 4, 1960) (Shipowner's Petition page 13).[31]

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[29] This case involved a hatch beam with a defective locking device. One of the vessel's officers specifically told the stevedoring company's employees not to work without removing the hatch beams from the hatch. On the first day of operations the stevedore removed all of the hatch beams, but on the second day of the operations it did not do so and the defective hatch beam was the cause of the longshorman's injury. The vessel was unseaworthy because of the defective hatch beam, and the vessel recovered indemnity because it was the duty of the stevedoring company to correct the unseaworthy condition by simply removing the hatch beam. Such is not the situation in the present case, where the affirmative duty existed on the shipowner and not on the stevedoring company to correct the defective condition which caused the accident.

[30] A longshoreman was injured because of some defective dunnage (boards) in the hold. The stevedore had removed part of the defective dunnage but did not remove all of it and the longshoreman was injured on some of the dunnage left in the hold. The defective dunnage made the vessel unseaworthy and the stevedore was required to indemnify the vessel because it had failed in its duty to remove the defective dunnage that would have prevented the accident. The stevedore was held liable for indemnity because it had the duty to correct the defective condition which caused the accident and failed to do so. The stevedoring company breached no such duty in this case since it was the shipowner's responsibility to repair the defective winch.

[31] A longshoreman was injured because of a defective ladder furnished by the vessel. The stevedore was held liable for indemnity because its safety man, with knowledge that the ladder might be defective, failed in his duty to make a further

4. *American Export Lines, Inc.* v. *Revel*, 162 F. Supp. 279, 266 F. 2d 82 (C.A. 4, 1959). (Shipowner's Petition, page 14).[32]

5. *Weigel* v. *M/V BELGRANO*, 188 F. Supp. 605 (D.C. Ore., 1960). (Shipowner's Petition page 14).[33]

6. *Drago* v. *A/S INGER*, 194 F. Supp. 398 (E.D., N.Y., 1961), affd. at 305 F. 2d 139 (2nd Cir., 1962), cer-

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and proper inspection which would have revealed the defective condition of the ladder. Here again, the duty to inspect the ladder was the responsibility of the stevedoring company's safety man and for failing to properly perform this duty, indemnity was allowed.

[32] This is the principal case involving a winch relied on in the shipowner's petition. The affirmance of the District Court's opinion by the Court of Appeals for the Fourth Circuit expressly reflects that it was predicated on the assumption the vessel's officers did not have knowledge of the defective condition of the winch. Thus, *Revel* does not assist the shipowner in this case, for there was no finding that the vessel's officers had knowledge of the defective winch and permitted it to remain in use. Whatever the result in a case such as Revel, where there is no finding of knowledge on the vessel's part and no assent by the vessel to the continued use of an unseaworthy winch, it is of no significance here where the jury found that the shipowner had knowledge of the defect, assented to the continued use of the defective winch, and negligently failed to make repairs to the winch as it was its affirmative duty to do under the contract.

[33] The injury to the plaintiff in this case was caused by a defective condition of lift gear aboard the vessel. Only the stevedore had knowledge of the defective condition, and the vessel did not. Indemnity was permitted because the stevedore used the gear in disregard of a known defect when the vessel did not know of the defect. In the instant case, the shipowner had knowledge of the defective gear and negligently failed to repair it. It is also interesting to note that the same Court which decided the *Weigel* case also decided *Marshall* v. *SS Lake Atlin*, 1960 A.M.C. 2024 (D.C. Ore. 1960) and reached exactly the opposite result in the same year.

tiorari denied 21 Law Week, 3185. (Shipowner's Petition pages 12 and 14).[34]

As the foregoing summary of the cases relied on by the Petitioner demonstrates, they are not in fact in any way comparable to the factual situation existing in the present case. On the other hand, the ten cases relied on by the Respondent and discussed in detail *supra*, pages 11 to 16, are all substantially identical with the present case and clearly demonstrate the soundness of the decision of the Court below.

NO QUESTION OF GENERAL IMPORT ON MARITIME LAW IS PRESENTED

As the foregoing portions of this brief and the opinion of the Court below reflect by its own contractual provisions in this case, the shipowner retained complete supervisory control over the stevedoring operations at all times. This contractual provision is unique and is not generally found in such contracts. Not only the decisions of this court in *Ryan* and *Weyerhaeuser*, but all of the cases relied on by both the shipowner and by the stevedore in this case had no comparable contractual provision. Quite to the contrary, in these other cases the responsibility for the control and supervision of the stevedoring operations was turned over to the stevedoring company, with the shipowner relying on

[34] Indemnity was allowed in the *Drago* case because the stevedore had the duty to replace a missing pin on one of the vessel's winches and did not do so. There was no finding or evidence to support a finding that the missing pin had been reported by the stevedore to the vessel owner, or that the vessel owner had knowledge of it, and there was no evidence indicating that it was the vessel owner's duty to replace the pin.

the stevedoring company to fully exercise its expertise in the field. For reasons best known to the shipowner in this case, however, it was unwilling to permit the stevedoring company to supervise its own operations. Instead, the shipowner made this perfectly plain in its stevedoring contract, and on the date of this accident had two of the vessel's officers personally present at the hold to supervise these operations.

While the shipowner's Petition attempts to create the impression that the Court below has in some way imposed Texas law on this maritime case, nothing could be further from the truth. The opinion of the Court below clearly shows that it relied solely on Federal maritime cases in arriving at its decision.[3] Thus, no Texas law was engrafted onto the maritime law by the Court below, and the shipowner's contention that the stevedore's warranty of workmanlike service previously established by this court has been cancelled by some misapplication of the Texas law is patently incorrect.

Nor will the shipowner's contention that it is the longshoremen and their surviving beneficiaries who will be the real losers if the decision below is to stand, bear even casual scrutiny. As this case demonstrates, where a shipowner negligently fails in its contractual obligations to both the longshoremen and his stevedoring company employer, the longshoreman or his beneficiaries will recover their full compensatory damages from the party actually responsible for the injury and death — the shipowner. The decision of the

[3] In fact, only two Texas cases are even cited by the Court below. Both were cited because of the definitions contained in them of words "supervision" or "to supervise". (See opinion below, Appendix A, Shipowner's Petition, Page 25). The substantive law of the case was taken solely from Federal court decisions.

Court below does not license a stevedore to ignore dangerous conditions as the shipowner's Petition would have this Court believe, but a reversal of it would certainly be a license to a shipowner to furnish defective and unseaworthy equipment and to ignore its duty to repair it during cargo operations. To reverse the decision of the Court below would remove any incentive the shipowner had to repair its own defective equipment for it would be able to flagrantly disregard its contractual obligations to the stevedore and still recover any damages it might have to pay from a stevedore who did nothing more than use the vessel's equipment for the purpose for which the shipowner had supplied it. Any decision contrary to that of the Court below in this case would encourage shipowners and the officers and crews of their vessels to ignore dangerous and unsafe conditions aboard their vessels about which they had full knowledge, and this even though the vessel itself and not the stevedoring company had the sole duty and responsibility to correct such unsafe conditions. This is not the law, has not been the law, and should never be permitted to become the law.

The particular provision of the stevedoring contract involved in this case, and the gross breach of its contractual obligations by the shipowner in negligently furnishing a defective winch, in negligently permitting the operations to continue and in negligently failing to repair the winch are such as to clearly reflect that the party actually responsible for this longshoreman's death has already paid the judgment. Because of the contractual provisions and these facts, the case therefore does not present an important question of general interest in the field of maritime law. Both the conduct of the shipowner and the provisions of the stevedoring contract are such as to clearly indicate that they

substantially alter the usual contractual relationship between a shipowner and stevedore from which cases such as this usually arise, so that consideration of this case would not permit the court to establish any guide lines that would be of general use and application in this area of the law.

CONCLUSION

For the foregoing reasons, the shipowner's Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: November 6, 1963.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on the attorneys for the Petitioner, Mr. Carl G. Stearns, Mr. S. G. Kolius, Mr. Ed Bluestein, Jr. and Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, 77002, by depositing the same in the United States Post Office with first-class postage pre-paid to the address shown above on this the 6th day of November, 1963.

Ed Vickers

ROYSTON, RAYZOR & COOK